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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2009 OCT 15 PM 4:44
CLERK

N. Seguir

IN THE SUPERIOR COURT OF STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO STRIKE DEATH NOTICE

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Strike Death Notice and requests that Defendant's Motion be denied. The State of Arizona's Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

1. On October 23, 2008, Defendant was arrested for Burglary in the First Degree and the First Degree Murder of his ex-wife, Carol Kennedy.
2. On October 31, 2008, the Yavapai County grand jury, having found probable cause to believe Defendant had committed these crimes, returned an Indictment charging Defendant with the same.

1 3. On November 20, 2008, the State filed notice that it would seek the death penalty as a
2 result of four statutory aggravating circumstances; A.R.S. §§ 13-703(f)(2), (5), (12) and (13)¹.

3 4. Defendant successfully moved for a New Finding of Probable Cause and the case was
4 remanded to the grand jury. On February 12, 2009, Defendant was once again indicted on
5 exactly the same charges as those in the original Indictment.
6

7 5. On March 24, 2009, Defendant filed a second Motion for New Finding of Probable
8 Cause. This motion was ultimately denied on May 12, 2009.

9 6. On May 13, 2009, the State filed a second Notice to Seek the Death Penalty alleging
10 the same aggravators as those in the original Notice.

11 7. In early June 2009, the original prosecutor retired and the undersigned prosecutor was
12 appointed to the case. After a review of the facts, it appeared that Defendant committed the
13 murder of Carol Kennedy in an especially heinous, cruel and depraved manner. On June 29,
14 2009, the State filed an Amended Notice of Intent to Seek the Death Penalty alleging the
15 A.R.S. § 13-703(f)(6) aggravator.
16

17 8. On August 25, 2009, Defendant filed a Motion to Dismiss Death Penalty Notice or, In
18 the Alternative, for a Probable Cause Hearing on the State's Noticed Aggravating
19 Circumstances.

20 9. The State filed a response outlining the State's evidence regarding the death penalty
21 aggravators. At hearing on September 22, 2009, Defendant argued that based on the State's
22 untimely response, the death penalty aggravators should be dismissed.
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¹ Renumbered as A.R.S. § 13-751 effective January 1, 2009. This pleading will refer to statutory numbering effective in 2008.

1 10. The Court denied Defendant's request to dismiss the death penalty aggravators and
2 scheduled a probable cause hearing on the aggravators for October 20, 2009.

3 11. On October 7, 2009, Defendant filed his Motion to Strike Death Notice, claiming the
4 Notices were untimely and the proper remedy is to strike the State's Notice of Intent to Seek
5 the Death Penalty.
6

7 **LEGAL ARGUMENT:**

8 *Defendant received notice that the State would seek the death penalty*
9 *November 21, 2008. The timeliness of the subsequent Notice of Intent to Seek*
10 *the Death Penalty and Amended Notice of Intent to Seek the Death Penalty is*
11 *reasonable considering the overall evolution of the case and the delay was not*
12 *so egregious as to warrant striking the Notice of Intent to Seek the Death*
13 *Penalty.*

14 *Ariz. R. Crim. P. Rule 15.1(i)(1) mandates that "[t]he prosecutor, no later that 60 days*
15 *after arraignment in superior court, shall provide to the defendant notice of whether the*
16 *prosecutor intends to seek the death penalty." The purpose of Rule 15.1(i) "is to ensure that a*
17 *defendant receives timely, actual notice of the state's penalty phase objectives. State v.*
18 *Cropper, 205 Ariz. 181, 184, 68 P.3d 407, 410 (2003). The Arizona Supreme Court has held*
19 *that "[t]he state cannot seek the death penalty if its failure to comply with Rule 15's time*
20 *requirement results in prejudice to the defendant." Id.; see also Holmberg v. DeLeon, 189*
21 *Ariz. 109, 938 P.2d 1110 (1997); State v. Lee, 185 Ariz. 549, 917 P.2d 692 (1996); Barrs v.*
22 *Wilkinson, 186 Ariz. 514, 942, P.2d 1033 (1996).*

23 In the instant case, Defendant, who was arrested on October 23, 2008, and originally
24 indicted by the grand jury on October 31, 2008, received notice of the State's intent to seek the
25 death penalty on November 21, 2008. Clearly, the State's first Notice of the State's Intent to
26 Seek the Death Penalty was filed within the time allowed by Rule 15.1(i). From late December
2008 through mid-May 2009, the parties litigated numerous motions pertaining to public

1 records, cameras in the courtroom, Defendant's requests to modify conditions of release, and
2 Defendant's two motions for a new finding of probable cause. Defendant's first Motion for a
3 New Finding of Probable Cause was granted and the case was remanded to the grand jury on
4 January 22, 2009. Following a second indictment by the grand jury on February 6, 2009,
5 Defendant filed another Motion for New Finding of Probable Cause on March 24, 2009. This
6 second motion was ultimately denied on May 12, 2009. The following day, May 13, 2009, the
7 State filed its second Notice of Intent to Seek the Death Penalty, which alleged the same four
8 statutory aggravators as the first.

10 After the original prosecutor retired in early June, the case was reviewed by the current
11 prosecutor, who, based on the facts of the case, determined the (f)(6) aggravator was applicable
12 and the Amended Notice of Intent to Seek the Death Penalty was filed on June 29, 2009, nearly
13 a year before the guilt phase of the trial was schedule to begin. Now, almost a year after the
14 original Notice was filed and months after May 13th filing and the June 29th filing, Defendant
15 objects.

17 "Prohibiting the prosecution from seeking a capital sentence ... may be appropriate
18 where, for instance, the state's violation is particularly egregious or the defendant will suffer
19 real harm." *Holmberg v. DeLeon*, 189 Ariz. 109, 111, 938 P.2d 1110 1112 (1997). Here, there
20 is good cause for the timeliness of the Notices filed in May and June of 2009. Moreover,
21 Defendant has failed to show harm. The State believed a second filing of the Notice of Intent
22 prior to the Court's ruling on Defendant's second Motion for New Finding of Probable Cause
23 would have been premature; however, once the ruling was issued, the prosecutor immediately
24 filed the second Notice. As to the addition of the (f)(6) aggravator filed in late June, this too is
25 reasonable under the circumstances and, again, Defendant has failed to show prejudice or harm
26

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1 from the Amended Notice. Under the current trial scheduled, Defendant will have had at least
2 eleven months to prepare a defense to the alleged aggravators. A defendant seeking preclusion
3 "should be prepared to show some prejudice from surprise or delay." *Holmberg v. DeLeon*,
4 189 Ariz. 109, 111, 938 P.2d 1110, 1112 (1997). Defendant demonstrates none.

5 In *State v. Cropper, supra*, the defendant received notice of two death penalty
6 aggravators in a timely manner. While in custody, the defendant stabbed a fellow inmate and
7 was charged with aggravated assault. The prosecutor advised the court and the defendant that
8 the state would seek an (f)(2) aggravator if the defendant was convicted of aggravated assault.
9 The defendant was convicted on that charge and during the penalty phase of the trial, the court
10 determined that the state had established all three aggravators and the defendant was sentenced
11 to death. On appeal, the Arizona Supreme Court determined that the defendant was not
12 prejudiced by the state's delay on the (f)(2) aggravator because defendant received notice soon
13 after the crime occurred and four months before the aggravation/mitigation hearing began. *See*
14 *also State v. Jackson*, 186 Ariz. 20, 24, 918 P.2d 1038, 1042 (1996) (there was no prejudice
15 where defendant was aware of the prosecutor's intent to seek the death penalty and defendant
16 had close to five months from the time of formal notice to prepare for trial).

17 Defendant's argument relies solely on alleged missed deadlines to support striking the
18 notice of intent to seek the death penalty; however, when one examines the overall evolution of
19 this case, specifically the multiple motions for new finding of probable cause, there is good
20 cause for the timing of the State's filings, and, absent of showing a prejudice, the timeliness, or
21 lack thereof, the delay was not so egregious as to warrant preclusion. In *State v. Lee*, 185 Ariz.
22 549, 917 P.2d 692 (1996), the Arizona Supreme Court determined that the trial court did not
23 abuse its discretion when it declined to impose any sanction for the state's failure to file a
24
25
26

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1 notice of intent to seek the death penalty until after the legal time limit because Defendant
2 failed to demonstrate prejudice. "[A]bsent prejudice, the violation of a procedural rule
3 designed to safeguard a constitutional right is not necessarily the same thing as a violation of
4 the right itself." *Id.* at 556, 917 P.2d 692 at 699. In this case, as in *Lee*, "[D]efendant had
5 actual notice of the [S]tate's intent and [has] ample opportunity to prepare a defense, so due
6 process was served." *Id.* Absent a showing of prejudice, Defendant's request to Strike the
7 Death Notice should be denied.
8

9 **CONCLUSION:**

10 All parties have been acutely aware that this is a capital case since the filing of the first
11 Notice of Intent filed on November 21, 2008, well within the time frame allowed by *Ariz. R.*
12 *Crim P.* Rule 15.1(i). Defendant will have ample time to prepare a defense on the (f)(6)
13 aggravator as the Amended Notice was filed nearly eleven months before trial is scheduled to
14 begin. Absent a showing of prejudice from the timeliness of the filing of the Notices,
15 Defendant's Motion to Strike Death Notice should be denied.
16

17 RESPECTFULLY SUBMITTED this 15th October, 2009.
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19 Sheila Sullivan Polk
20 YAVAPAI COUNTY ATTORNEY

21 By: 
22

23 Joseph C. Burner
24 Deputy County Attorney
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COPIES of the foregoing delivered this
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